

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





74-2267

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Appellee,

-against-

OSWALDO LONDONO-ECHEVERRY

Appellant.  
-----x

Docket No. 74-2267

=====

APPENDIX TO APPELLANT'S BRIEF

=====

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

WILLIAM EPSTEIN

Of Counsel

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3

PAGINATION AS IN ORIGINAL COPY



## CRIMINAL DOCKET

TITLE OF CASE

THE UNITED STATES

vs.

REYNALDO SANTIAGO-LUGO,

OSWALDO LONDONO-ECHEVERRY

ATTORNEYS

For U.S. Woodfield

LONDONO-ECHEVERRY

For Defendant: Frank A. Lopez

31 Smith St.- B'klyn. N.Y.

237-9500

Did possess cocaine

ABSTRACT OF COSTS

AMOUNT

CASH RECEIVED AND DISBURSED

DATE

NAME

RECEIVED

DISBURSED

Fine,

Clerk,

Marshal,

Attorney,

Commissioner's Court,

Witnesses,

9-25-74 Notice of appeal (No fee)  
 (LONDONO-ECHEVERRY)

DATE

PROCEEDINGS

2-5-74 Before BARTELS, J.- Indictment filed  
 2-8-74 Govts Notice of Readiness for Trial filed  
 2-11-74 Before COSTANTINO, J.- Case called- Defts and counsels present- Defts  
 arraigned and each enters a plea of not guilty- Case set down for trial  
 on 3-11-74 Defts in custody  
 3-7-74 Magistrate's file 74 M 177 inserted into CR file.  
 3-11-74 Before COSTANTINO J - case called - deft Lugo & counsel Mr. Tomei  
 present - Erny Trumpy sworn as interpreter - deft arraigned and  
 having been advised of his rights and on his own behalf enters  
 a plea of guilty to counts 1 and 2 - after withdrawing his plea  
 of not guilty - sentence adjd without date - defts in custody -  
 case as to deft OSWALDO LONDONO-ECHEVERRY adjd to 4-1-74 for trial.

ONLY COPY AVAILABLE

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
4-1-74	Before COSTANTINO J - case called - deft LONDONO-ECHEVERRY & atty present - adjd to 4-8-74 for trial.		
4-8-74	Before COSTANTINO, J.- Case called- Deft and counsel and interpreter Maria E. Cardenas present- Court relieves assigned counsel- Case adjd to 4-24-74 at 10:00 A.M. for trial (LONDONO-ECHEVERRY)		
4-8-74	Notice of appearance filed (LONDONO-ECHEVERRY)		
4-24-74	Before COSTANTINO J - case called - deft Londono-Echeverry & counsel <del>Mr. Rosenberg</del> present - Interpreter Maria Cardenas present - <del>an</del> oral motion to withdraw as atty granted - court appoints Legal Aid -case set for May 1, 1974 to set date for trial.		
5-1-74	Before COSTANTINO, J.- Case called- Deft and counsel Marion Seltzer of Legal Aid present- Interpreter Daisy Santos sworn- Case set down for trial on 5-13-74 at 10:00 A.M. for deft LONDONO-ECHEVERY- Sentence as to deft SANTIAGO-LUGO adjd from 5-3-74 to 5-17-74 at 10:30 A.M.		
5-13-74	Before COSTANTINO J - case called - deft LONDONO-ECHEVERRY & counsel M. Seltzer of Legal Aid present with interpreter Emil Rodriguez - case adjd to June 3, 1974 for trial.		
5-17-74	Before COSTANTINO J - case called & sentence adjd to June 7, 1974 (SANTIAGO-LUGO)		
5-23-74	Govts Memorandum of Law filed (LONDONO-ECHEVERRY)		
6-3-74	Before COSTANTINO, J.- Case called- Deft and counsel Marion Seltzer of Legal Aid present- with interpreter Emil Rodriguez- Adjd to 6-17-74 for trial at 10:00 A.M.		
6-7-74	Before COSTANTINO J - case called - deft SANTIAGO-LUGO & counsel A. Tomei present - Interpreter E. Trumby present - deft sentenced to imprisonment for 6 years on each of counts 1 and 2 to run concurrently and 6 years special parole term - deft to be deported after completion of sentence. On motion of AUSA Kimelman deft to be held at West St. Federal Detention Headquarters until so directed.		
6-7-74	Judgment & Commitment filed - certified copies to Marshal (SANTIAGO-LUGO)		
6-13-74	Certified copy of Judgment and commitment ret'd and filed- deft delivered to Federal Detention Headquarters (SANTIAGO LUGO)		
6-17-74	Before COSTANTINO J - case called - deft Londono-Echeverry & counsel M. Seltzer of Legal Aid present with Interpreter Emil Rodriguez - adjd to June 19, 1974 @ 9:15 am for trial.		
6-19-74	Before COSTANTINO J - case called - deft Echeverry & atty M. Seltzer present - Daisy Santos present -interpreter sworn - suppressing hearing begun - Motion to suppress tapes is denied - Hearing concluded.		



74 CR-89  
CRIMINAL DOCKET

DATE	PROCEEDINGS
6-19-74	Before COSTANTINO J - case called - deft & atty M. Seltzer present - trial ordered & BEGUN - Jurors selected and sworn - Trial continued without date (Echeverry)
6-24-74	Voucher for compensation of counsel filed (Santiago-Lugo)
6-27-74	Before COSTANTINO, J.- Case called- Deft and counsel present-Interpreter Richard Mira present and sworn- Trial resumed- Trial contd to 6-28-74 10:00 A.M. (ECHEVERRY)
6/28/74	Before COSTANTINO, J.- Case called- Deft, atty and interpreter present Motion to dismiss the indictment -Motion denied-Trial cont;d to 7/1/74
7/1/74	Before COSTANTINO, J.- Case called- Deft, atty and interpreter present (deft L-ECHEVERY and counsel M. Seltzer)-Trial resumed- Trial cont'd to 7/2/74
7-2-74	Before COSTANTINO, J.- Case called- Deft and counsel present- Interpreter present-Trial resumed-Order of sustenance signed-Trial contd to 7-3- at 10:00 A.M. (LONDONO-ECHEVERY)
7-2-74	By COSTANTINO, J.- Order of sustenance filed
7-3-74	Before COSTANTINO, J.- Case called- Deft and counsel and Interpreter present- Trial resumed- Jury resumes deliberations- Jury returns at 1:00 P.M. and finds the deft guilty as to counts 1 and 2- Jury polled- Jury discharged- Trial concluded- Sentence adjd without date (LONDONO-ECHEVERRY)
7-3-74	Stenographers Transcript dated 6-27-74, 6-28-74 and 7-1-74 filed
7-8 -74	Voucher for compensation of expert services filed (Londono-Echeverry- (Ricardo Mira interpreter)
7/12/74	Voucher for expert services filed. (ECHEVERRY)
7-26-74	Stenographers Transcript dated 7-2-74 filed
8-1-74	Notice of motion for a reduction of sentence filed ret 9-17-74 (SANT)
9-9-74	Petition for Writ of Habeas Corpus Ad Testificandum filed
9-9-74	By Costantino J - Writ Issued, ret. 9-17-74 (Santiago Lugo)
9/17/74	Before COSTANTINO, J.- Case called- Motion adjd to 9/23/74
9-20-74	Before Costantino J - case called - deft Echeverry & counsel M.Seltzer of Legal Aid present - deft sentenced on each of counts 1 and 2 for a period of 4 years to run concurrently plus special parole term of 6 years and deft to be deported upon completion of his prison term. Deft advised of right to appeal without prepayment of fees.
9-20-74	Judgment & Commitment filed - certified copies to Marshal (Echeverry)

DATE	PROCEEDINGS
9-23-74	Before Costantino J - case called on motion for reduction of sentence - Deft & counsel Albert Tomei present - Alicia Mira present (Interpreter) Motion/ <sup>argued and</sup> granted - sentence reduced to 4 years imprisonment.
9-23-74	Amended Judgment & Commitment filed - certified copies to Marshal.
9-13-74	2 stenographic transcripts filed re deft Santiago-Lugo (one dated March 11, 1974 and one dated June 7, 1974)
9-24-74	<del>Certified copy of writ</del> Writ ret'd and filed- executed (SANTIAGO-LUGO)
9-25-74	Notice of appeal filed (LONDONO-ECHEVERRY)
9-25-74	Docket entries and duplicate of notice of appeal mailed to c of appeals
10/1/74	Certified copy of Order for reduction of sentence ret'd and filed- deft to be ret'd to U.S. Penitentiary at Lewisburg Penn (SANTIAGO-LUGO)
10-1-74	Certified copy of Judgment and Commitment ret'd and filed- Deft delivered to Federal detention Headquarters (LONDONO-ECHEVERRY)
10/8/74	Voucher for compensation of counsel filed (SANTIAGO-LUGO)
10/9/74	Stenographers Transcript dated 9/20/74
10-11-74	Voucher for Expert Services filed (Echeverry)
10/15/74	Stenographers Transcript dated 7/3/74 filed

A TRUE COPY	
ATTEST	
DATED	10/17/74
LEWIS ORGER	
BY	<i>[Signature]</i> CLERK
DEPUTY CLERK	



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

74CR 89

- - - - - X

UNITED STATES OF AMERICA

INDICTMENT

- against -

REYNALDO SANTIAGO-LUGO  
OSWALDO LONDONO-ECHEVERRY,

Cr. No.  
(T. 21, U.S.C., §841(a)(1) and  
T. 18, U.S.C., §2)

Defendants.

- - - - - X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 28th day of January 1974, within the Eastern District of New York, the defendant REYNALDO SANTIAGO-LUGO and the defendant OSWALDO LONDONO-ECHEVERRY, did knowingly and intentionally possess with intent to distribute approximately 1/8 kilogram of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT TWO

On or about the 28th day of January 1974, within the Eastern District of New York, the defendant REYNALDO SANTIAGO-LUGO and the defendant OSWALDO LONDONO-ECHEVERRY, did knowingly and intentionally distribute approximately 1/8 kilogram of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

A TRUE BILL

Yolanda G. Edstrom

FOREMAN.

Edward John Boyd Jr.  
UNITED STATES ATTORNEY GAW  
EASTERN DISTRICT OF NEW YORK

## Charge of the Court

FL:GA  
T5R3

Mr. Foreman, ladies and gentlemen of the jury:

We now come to the final stage of the proceedings. The Court will now Charge you on the law to be applied to the facts in the case.

As you may recall, I initially gave you a pre-Charge as to the manner in which the case would be presented to you. I told you that most of the evidence in the case would come in the form of the testimony of witnesses, and that you were to pay special attention to the manner in which the witnesses testified.

I believe I also instructed you that you would be the judges of the facts in the case, that being your sole province; and that your recollection of the facts after having heard all of the evidence in the case -- the testimony of witnesses and the documentary proof was to control the determination of the issues.

Likewise at that time I told you that I would be the judge of the law. This has not changed at this stage of the proceedings. I will not review the facts in this case for you because I am certain that with Summations by the attorneys there is no need for the Court to review the facts. In any event, if you find that there is some fact in the case that you may have forgotten or don't recollect, or you can't agree with



## Charge of the Court

each other in your deliberations, you can have it read back from the record, and that will, I am sure, refresh your memory.

In any event, I am the judge of the law. You must accept what I say to be the law in this case.

Now, the attorneys have been permitted by the Court and by the rules to make Opening statements and Summations to you. Under no circumstances are the statements they have made by way of Opening or by way of Summation to be taken as evidence. However, the Court and the law does permit you to take the arguments that they have proffered before you and weigh those arguments. And if you agree with what they have said on either side of the case, you may use those arguments in your deliberations and in discussing the case with each other, and try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not commensurate with the testimony and the proof in the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you may discuss that portion of it if you so desire.

1  
2 Now, of course, I also said to you that during  
3 the trial the Court will be the judge of the law. Like-  
4 wise, as to motions which at times we had at a side bar,  
5 as you may recall. That was not for the purpose of  
6 keeping any of the proof from you, but were matters of  
7 law that were discussed between the attorneys and the  
8 Court itself and should not have come before you. In  
9 any event, if you feel that you have discovered by some  
10 stretch of your imagination what this Court thinks as to  
11 either some of the testimony or the case itself, you  
12 should remove that from your mind because I tell you  
13 here and now I have come to no conclusion in this case,  
14 nor have I indicated to you in any way whatsoever what  
15 what my feeling is with reference to the facts in the  
16 case, or with reference to the guilt or innocence of  
17 the defendants. That is your province and your job.  
18 You should not try to weigh what you believe the Court's  
19 impression may be.

20 You must understand that the lawyers who appear  
21 before you are advocates. They are advocating the best  
22 case they can for the parties they represent, and they  
23 have a right to exercise as much forcefulness as they  
24 desire in their questioning, or otherwise in presenting  
25 their case. I say this because this is within the frame-  
work of the ordinary trial.



## Charge of the Court

Of course, you know by this time that this case has come before you by way of an indictment presented by a Grand Jury sitting in this Eastern District. That indictment charges the defendant with the Counts I shall now read to you. Remember, the indictment is merely an accusation, merely a piece of paper. It is not evidence, and is not proof of anything.

(continued on next page.)

R3a fls 10

San3a  
SS

## Charge of the Court

THE COURT: (Continuing.) Count One: On or about the 28th day of January 1974, within the Eastern District of New York, the defendant Oswaldo Londono-Echevery, did knowingly and intentionally possess with intent to distribute approximately one-eighth kilogram of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

Count Two: On or about the 28th day of January 1974, within the Eastern District of New York, the defendant Oswaldo Londono-Echevery, did knowingly and intentionally distribute approximately one-eighth kilogram of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

Section 841(a)(1) reads in pertinent part as follows:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally ... to distribute or possess with intent to distribute ... a controlled substance.

Cocaine is a controlled substance.



Both counts of the indictment also charge the defendant with being an aider and abettor.

Section 2 of Title 18 of the United States Code reads as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The essential elements of Count One of the indictment, all of which the government must prove beyond a reasonable doubt or else you must acquit the defendant, are as follows:

First, that the defendant possessed approximately one-eighth kilogram of cocaine;

Second, that he possessed the cocaine with the intent to distribute it;

Third, that he understood that the substance he possessed was cocaine, or some other illegal drug; and

Fourth, that he understood he was acting

illegally.

The law recognizes two kinds of possession: Actual and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

You may find that the goods, cocaine, mentioned in the indictment were in the defendant's possession if you find beyond a reasonable doubt that the defendant knowingly had them in his power or under his control, even though it may have been in the actual physical possession of another. Since actual manual or personal possession by the defendant is not a necessary element of the crime.

The term "distribute" means to deliver. The



4 Charge of the Court

2 term "deliver" means the actual, constructive, or  
3 attempted transfer of a controlled substance.

4 The essential elements of Count Two are as  
5 follows:

6 First, that the defendant distributed approxi-  
7 mately one-eighth kilogram of cocaine;

8 Second, that he understood the substance he  
9 distributed was cocaine or some other illegal drug;  
10 and

11 Third, that he understood that he was acting  
12 illegally.

13 Both counts of the indictment also charge the  
14 defendant with being an aider and abettor.

15 In order to aid and abet another to commit a  
16 crime it is necessary that an accused willfully  
17 associate himself in some way with the criminal  
18 venture, and willfully participate in it as he would  
19 in something he wishes to bring about; that is to  
20 say, that he willfully seeks by some act or omission  
21 of his to make the criminal venture succeed.

22 An act or omission is "willfully" done, if  
23 done voluntarily and intentionally and with the  
24 specific intent to do something the law forbids, or  
25 with the specific intent to fail to do something the

5

## Charge of the Court

1  
2 law requires to be done; that is to say, with bad  
3 purpose either to disobey or to disregard the law.

4 You of course may not find a defendant guilty  
5 unless you find beyond a reasonable doubt that every  
6 element of the offense as defined in these in-  
7 structions was committed by some person or persons,  
8 and that the defendant participated in its commission.

9 Mere presence at the scene of the crime and  
10 knowledge that a crime is being committed are not  
11 sufficient to establish that the defendant aided and  
12 abetted the crime, unless you find beyond a reasonable  
13 doubt that the defendant was a participant and not  
14 merely a knowing spectator.

15 (Continued on next page.)  
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17  
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## Charge of the Court

THE COURT: (Continuing.) Now, there are in any case, and in this one, two types of evidence from which a jury may properly find a defendant guilty of a crime, one is direct evidence such as testimony of an eyewitness, the other is circumstantial evidence which is proof of a chain of facts and circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

A defendant is presumed innocent of the crime. Thus the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused, so that the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of

## 2 Charge of the Court

1  
2 all the evidence in the case.

3 It is not required that the government prove  
4 guilt beyond all possible doubt. The test is one of  
5 reasonable doubt, and reasonable doubt is doubt based  
6 upon reason and common sense, the kind of doubt  
7 that would make a reasonable person hesitate to act.  
8 Proof beyond a reasonable doubt must, therefore, be  
9 proof of such a convincing character that you would  
10 be willing to rely and act upon it unhesitatingly in  
11 the most important of your own affairs.

12 You, the jury, will remember that a defendant  
13 is never to be convicted on mere suspicion or con-  
14 jecture. The burden is always upon the prosecution  
15 to prove guilt beyond a reasonable doubt. This  
16 burden never shifts to a defendant. The law never  
17 imposes upon a defendant in a criminal case the  
18 burden or duty of calling any witnesses or producing  
19 any evidence.

20 A reasonable doubt exists whenever, after  
21 careful and impartial consideration of all the  
22 evidence in the case, the jurors do not feel con-  
23 vinced to a moral certainty that a defendant is  
24 guilty of the charge. So, if the jury views the  
25 evidence in the case as reasonably permitting either



1                   3                   Charge of the Court  
2 of two conclusions, one of innocence, the other of  
3 guilt, you, the jury, should, of course, adopt the  
4 conclusion of innocence.

5                   I have said that the defendant may be proven  
6 guilty either by direct or circumstantial evidence.  
7 I have said that direct evidence is the testimony of  
8 one who asserts actual knowledge of a fact, such as  
9 an eyewitness. Also circumstantial evidence is  
10 proof of a chain of facts and circumstances indicating  
11 the guilt or innocence of a defendant. You, the  
12 jury, may make common sense inferences from the  
13 proven facts.

14                   It is not necessary that all inferences drawn  
15 from the facts in evidence be consistent only with  
16 guilt and inconsistent with every reasonable hypo-  
17 thesis of innocence or that there must be no reason-  
18 able doubt as to each chain of proof. The test is  
19 one of reasonable doubt, and should be based upon  
20 all the evidence, the testimony of the witnesses,  
21 the documents offered into evidence and the  
22 reasonable inferences which can be drawn from the  
23 proven facts.

24                   An inference is a deduction or conclusion  
25 which reason and common sense lead the jury to draw

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## Charge of the Court

from the facts which have been proved. You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

As I stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The crimes charged in this case are serious crimes which require proof of specific intent before a defendant can be convicted. Specific intent to commit the act. To establish specific intent, the government must prove that a defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding



## 5 Charge of the Court

1  
2 circumstances. You may consider any statement made  
3 and act done by a defendant, and all other facts and  
4 circumstances in evidence which indicate his state of  
5 mind. It is ordinarily reasonable to infer that a  
6 person intends the natural and probable consequences  
7 of acts knowingly done or knowingly omitted.

8 The charge in this indictment requires that  
9 the government prove that the defendant knowingly  
10 or intentionally performed the acts in violation of  
11 law. The Court will therefore define the words  
12 knowingly and intentionally.

13 An act is done knowingly if done voluntarily  
14 and intentionally, and not because of mistake or  
15 accident or other innocent reason.

16 The purpose of adding the word knowingly was  
17 to insure that no one would be convicted for an act  
18 done because of mistake, or accident, or other  
19 innocent reason.

20 (Continued next page.)  
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22  
23  
24  
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FL:GA  
T5 R3C AM

Charge of the Court

575

1  
2 You as jurors are the sole judges of the cred-  
3 ibility of the witnesses and the weight their testimony  
4 deserves, and it goes without saying that you should  
5 scrutinize all the testimony given, the circumstances  
6 under which each witness has testified, and every matter  
7 in evidence which tends to show whether a witness is  
8 worthy of belief. Consider each witness' intelligence,  
9 motive and state of mind, and his demeanor and manner  
10 while on the stand. Consider the witness' ability to  
11 observe the matters as to which he has testified, and  
12 whether he impresses you as having an accurate recollec-  
13 tion of these matters. Consider also any relation each  
14 witness may bear to either side of the case; the manner  
15 in which each witness might be affected by the verdict;  
16 and the extent to which, if at all, each witness is  
17 either supported or contradicted by other evidence in  
18 the case.

19 Inconsistencies or discrepancies in the testimony  
20 of a witness, or between the testimony of different wit-  
21 nesses, may or may not cause the jury to discredit such  
22 testimony. Two or more persons witnessing an incident  
23 or a transaction may see or hear it differently; and  
24 the innocent misrecollection, like failure of recollection  
25 is not an uncommon experience.



## Charge of the Court

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves. Another test that you can use in determining the truthfulness or credibility of a witness is to use your own good common sense in addition to these essentials that I have given you. You can use your good common sense as you do in your everyday experience where you must make important decisions based upon what others tell you. When you decide to either accept or ignore the statements of others, you use your common sense. Your good judgment will say to you somehow or other that whatever they say does not appear to be truthful, that somehow or other you just do not believe what they have said. That is your ability to determine the truthfulness of the person you are speaking with. Likewise, your common sense should be used to determine the weight to be given the testimony of a witness.

You take that same good common sense into the jury room, you do not leave it outside. In addition to

## Charge of the Court

1  
2 what I have said, use your common sense as a test in  
3 exercising your good judgment and in determining whether  
4 or not this defendant is guilty of the crimes charged.  
5 It is for you to determine whether the witnesses in this  
6 case have testified truthfully, whether or not they  
7 have an interest in the case, what that interest may be  
8 and how great it is, and whether or not they have told  
9 you falsehoods. This is all for you to determine.

10 When a defendant in a case of this kind takes  
11 the stand, which he has a perfect right to do, he is  
12 subjected to all the obligations of witnesses, and his  
13 testimony is to be treated like the testimony of any  
14 other witnesses; that is to say, it will be for you to  
15 say, remembering the substance of his testimony, the  
16 manner in which he gave it, his cross-examination, and  
17 everything else in the case, whether or not he told the  
18 truth. Then, again, it is for you to remember, you  
19 have a perfect right to do so, the very grave interest  
20 the defendant has in the case. As he places himself  
21 as a witness, he stands like any other witness.

22 Evidence that at some other time a witness,  
23 other than the accused, has said or done something, or  
24 has failed to say or do something, which is inconsistent  
25 with the witness' testimony at the trial, may be con-



## Charge of the Court

sidered by the jury for the sole purpose of judging the credibility of the witness; but may never be considered as evidence or proof of the truth of any such statement.

Where a witness is a defendant on trial in the case and, by such statements or other conduct, the defendant admits some fact against his interest, then the statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact so admitted, as well as for the purpose of judging the credibility of the defendant as a witness.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Every witness' testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case -- then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which was false, then the law allows you to take the portions which were true and weigh it and disregard those portions which were false. That, again, is within your prerogative.

## Charge of the Court

1  
2 The weight of the evidence is not necessarily  
3 determined by the number of witnesses testifying on  
4 either side. You should consider all the facts and  
5 circumstances in evidence to determine which of the  
6 witnesses are worthy of greater credence. You may find  
7 that the testimony of a smaller number of witnesses on  
8 one side is more credible than the testimony of a  
9 greater number of witnesses on the other side.

10 You are not obliged to accept testimony, even  
11 though the testimony is uncontradicted and the witness  
12 is not impeached. You may decide, because of the  
13 witness' bearing and demeanor, or because of the inher-  
14 ent improbability of his testimony, or for other reasons  
15 sufficient to you, that such testimony is not worthy of  
16 belief.

17 The Government is not required to prove the  
18 essential elements of the offense as defined in these  
19 instructions by any particular number of witnesses. The  
20 testimony of a single witness may be sufficient to con-  
21 vince you beyond a reasonable doubt of the existence  
22 of an essential element of the offense charged, if you  
23 believe beyond a reasonable doubt that the witness is  
24 telling the truth.

25 The testimony of an informer who provides evi-



## Charge of the Court

dence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an Accused be proved guilty beyond reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your Sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Charge of the Court

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

You are here to determine the guilt or innocence of the accused from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are also guilty. But if any reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the accused not guilty.

Now, in this type of case there must be a unanimous verdict, that means all twelve of you must agree, and it goes without saying that it becomes incumbent upon you to listen to one another and to argue out the



## Charge of the Court

1  
2 points among yourselves in order to determine in good  
3 conscience whether your fellow jurors' argument is one  
4 commensurate with yours, or whether at least you can with  
5 good conscience agree with him. \* You have no right to  
6 stubbornly and idly sit by and say, "I am not talking  
7 to anyone," "I am not going to discuss it," because  
8 people with common sense and the ability to reason must  
9 communicate, they must communicate their thoughts. So,  
10 anything which appears in the record and about which  
11 one of you may not agree -- talk it out amongst your-  
12 selves, and then, if you can't agree as to what is in  
13 the record, well, you can ask the Court to have that  
14 portion of the testimony read back to you. You may do  
15 so by knocking on the door and giving a note in writing  
16 to the Clerk, who will then present it to the Court,  
17 and I will then bring you into the courtroom.

18 The Foreman will preside over your deliberations,  
19 and will be your spokesman here in court.

20 (continued on next page.)

R3C-A fls  
21  
22  
23  
24  
25

As to the charges and the Counts in the Indictment, you now know there are two. You also know the essential elements that are involved. The Court will permit you to take into your jury room a copy of the Indictment. Each one will have a copy of it. And the form of your verdict will be -- And you, Mr. Foreman, will announce that verdict at the proper time -- If you should find the defendant Not Guilty as to Count One, you would announce it as "We find the defendant Not Guilty as to Count One."

If you should find him Not Guilty as to both Counts, the form of your verdict would be "We the jury find him Not Guilty as to both Counts."

The other form of verdict would be if you should find him Guilty as to Count One, you would make that announcement, that he is Guilty as to Count One, and if you find him Not Guilty as to Count Two, likewise make that announcement.

If you find him Guilty to both Counts, then you would announce it as such.

(continued on next page.)



## CHARGE OF THE COURT

1  
T-5 R-42  
Lewis:wp

2 And that is the Court's charge to the Jury.

3 MR. KIMELMAN: Your Honor, may we have a side  
4 bar?

5 (Discussion Side Bar:)

6 THE COURT: First of all, any exceptions?  
7 Do you have any exceptions?

8 MR. SELTZER: I assume you must have charged the  
9 definition of reasonable doubt.

10 THE COURT: Yes, all the way through.

11 MR. KIMELMAN: Your Honor, I would just make an  
12 additional request that some type of limiting instruction  
13 be given as to the transcripts as an aid to the jury.

14 THE COURT: Yes.

15 MR. KIMELMAN: I mean they can make their own  
16 determination and they can bring the tapes in.

17 THE COURT: I'll do that.

18 MR. KIMELMAN: They can bring the actual tapes  
19 and transcripts into the jury room.

20 THE COURT: Yes, I'll instruct them.

21 I did charge reasonable doubt all the way through.

22 (End Discussion Side Bar)

23 THE COURT: There is one request that's  
24 been made, and that is as to the transcripts and as to  
25 the tapes. Of course, you realize you can take the

## CHARGE OF THE COURT

1  
2 transcripts into your jury room. As to the recorder  
3 and the tapes, you will be able to take it, but before  
4 you take the recorder in someone will have to instruct  
5 the foreman to operate the recorder, so that you do not  
6 erase any part of the tapes themselves. I am certain  
7 there will be no problem. We have a man who can do  
8 that for you, but we'll do that after we get back from  
9 lunch. If you desire it and think you need it in your  
10 jury room, then we'll have it brought in. There is no  
11 sense in doing it now.

12 Now, of course, you also know the light in which  
13 you must -- when you are deliberating about the tape  
14 use the same common sense as you do with any other  
15 piece of evidence discussed. Among you in the manner  
16 of how you determine the weight of evidence and the  
17 credibility it's entitled to.

18 (Marshal sworn.)

19 THE COURT: All right, now, the alternates,  
20 if you wish you may go to lunch with them, but you are  
21 not to discuss this case at lunch at all, or on the  
22 way to lunch or at lunch, and I'll permit the alternates  
23 to go since you have been with us and you have spent  
24 so much time with us last night, and then after that  
25 you can be discharged right from the restaurant, you



CHARGE

need not come. And your term of service is likewise over, and thank you very much for being with us.

(Jury Out.)

(Lunch Recess.)

FL:wp  
P.M.  
R-1:T-1

AFTERNOON SESSION

(TIME: 4:55 P.M.)

(Lawyers Present, No Jury Present at Present.)

THE CLERK: Jury notes from Court's Exhibits 2 and 3.

THE COURT: They want to know -- first, they want Agent Kobell's testimony read over.

Secondly, they want the charge involving possession, aiding and abetting and mere present, which I will read.

MR. SELTZER: Smart Jury.

THE COURT: What?

MR. SELTZER: Smart Jury.

THE COURT: Naturally, they are all smart.

(Jury in.)

THE COURT: All right. The jury has sent a note to the Court in which they request the reading of the testimony of Agent Kobell on rebuttal.

They have also sent a note requesting the Court give its charge on possession, aiding and abetting and, what they said, "bystander," but that's mere presence.

(Direct and Cross Examination of the Witness Kobell were read by the reporter.)

THE COURT: All right, we'll now get into the definition of possession. The law recognizes two kinds



1 of possession, actual and constructive possession.  
2 A person who knowingly has direct physical control  
3 over a thing at a given time actually is then in  
4 possession of it. A person who, but not in full  
5 possession, has the power and the intention at a  
6 given time to exercise dominion and control over  
7 a thing either directly or through another person  
8 or persons is then in constructive possession of  
9 it.

10 You may find that the elements of possession  
11 as that term is used in these instructions are  
12 present if you find beyond a reasonable doubt that  
13 the defendant had actual constructive possession  
14 either alone or jointly with others.

15 You may find that the goods, cocaine, mentioned  
16 in the indictment were in the defendant's possession  
17 if you find beyond reasonable doubt that the  
18 defendant knowingly had them in his power or under  
19 his control, even though it may have been in the  
20 actual physical possession of another, since actual  
21 manual personal possession by the defendant is not  
22 a necessary element of the crime.

23 Both counts in the indictment also charge  
24 the defendant with being an aider and abettor. In  
25 order to aid or abet another to commit a crime is

1 is necessary but the accused wilfully associate  
2 himself in some way with the criminal venture  
3 and wilfully participate in it as he would in  
4 something he wishes to bring about; that is to  
5 say, that he wilfully seeks by some act or omission  
6 of his to make the criminal venture succeed.

7 An act for omission is wilfully done if  
8 done voluntarily or intentionally and with the  
9 specific intent to do something the law forbids,  
10 or with the specific intent not to do something  
11 the law requires to be done; that is to say,  
12 with bad purpose is to either disobey or disregard  
13 the law.

14 You, of course, may not find a defendant  
15 guilty unless you find beyond a reasonable doubt  
16 that every element of the offense as defined in  
17 these instructions was committed by some person or  
18 persons and that the defendant participated in its  
19 commission.

20 Mere presence at the scene of the crime and  
21 knowledge that a crime is being committed are not  
22 sufficient to establish that the defendant aided and  
23 abetted in the crime, unless you find beyond a  
24 reasonable doubt that the defendant was a participant  
25 and not merely a knowing spectator.



1 That's the Court's charge. Now you may retire.

2 (Jury out.)

3 THE COURT: About another half hour.

4 MR. SELTZER: Okay, because I wondered --  
5 I mean how late?

6 THE COURT: Then we'll send them home.

7 MR. KIMELMAN; Your Honor, I'd like to go on  
8 the record as asking the Court to keep the jury beyond  
9 6 o'clock at least.

10 MR. SELTZER: Your Honor, it would seem to me  
11 especially in view of the fact that we were all here  
12 until approximately 9 o'clock last night listening to  
13 evidence, in view of the fact that the jury was brought  
14 in at 9:30, early, that keeping them tonight any where  
15 past 5:30 or 6 o'clock would put a burden on them to  
16 come back with an immediate verdict, if only for the  
17 fact that they want to go home because they are tired.

18 THE COURT: I kind of agree with you.

19 MR. SELTZER: I'm sorry.

20 THE COURT: I'll keep them until 5:30 and then  
21 send them home.

22 MR. KIMELMAN: 6 o'clock?

23 THE COURT: No, 5:30.

24 MR. SELTZER: Just as a suggestion to the  
25 Court, I know that you have another jury coming in

1  
2 THE COURT: Yes.

3 MR. KIMMELMAN: At this point the Government  
4 would like to play the second portion of the tape.  
5 I will distribute the transcripts.

6 THE CLERK: Government Exhibit 3, previously  
7 marked for identification, now marked in evidence.

8 (So marked)

9 MR. KIMMELMAN: Ladies and gentlemen, again  
10 we are going to run a little test. Put the head  
11 phones on, adjust the volume. We'll start the tape  
12 and then restart it again.

13 (Juror No. 12 raises hand.)

14 THE COURT: What is it?

15 JUROR NO. 12: It's all right, your Honor,  
16 we found the other one.

17 (Test run.)

18 (Said tape played from beginning to end.)

19 AR: (Eng) We are going to see the sample.

20 NOISE 15 Sec.

21 S/AG G: (Eng) Tell him, I don't like doing  
22 this, tell him if...

23 AR: (Eng) Yeah, I know - (Spanish) that we  
24 don't want - we don't want to get ripped off.

25 SL: What do you mean - you don't want how's

that



1  
2 AR: Yeah, sure that you want to give us a  
3 hold up. You want to rip us off - you know - you  
4 want to get our money.

5 SL: No, man, No -, it's for you to see - if  
6 you like it - if you...

7 S/AG G: (Eng) Hey hand it to me - I'm not gettin in  
8 no car because I don't want to be ripped off -  
9 I don't want to meet your friend - tell him -  
10 I don't want to don't want to meet your friend all  
11 I want to do is see the merchandise.

12 AR: And he's right - we're afraid that  
13 you come out with pistols.

14 SL: No way, no...

15 AR: He doesn't even want to see it...

16 LE: Let's go, let's go, hurry up, let's go.

17 S/AG G: (Eng) Alright let me see.

18 SL: (Eng) No problem, no problem (Spanish  
19 We don't have none of those problems brother, we  
20 just want you to see it. (Eng) We want...

21 LE: Leave it - tell him to tell you... I'm  
22 leaving I'm leaving.

23 AR: OK he's interested. Tell him, brother  
24 that he'll see it brother.

25 S/AG G: (Eng) I'll go too - I can't get in

1  
2 the car tell him that I'm afraid, do you speak  
3 English? I'm afraid.

4 LE: (Eng) I understand, he has no problem  
5 with you (Spanish) Do you know him?

6 AR: (Eng) Yeah

7 LE: Well, the problems are his.

8 S/AG G: (Eng) I'm his brother, I trust him.

9 SL: Nobody is asking him for money, or asking  
10 him for nothing, we only want to see it - to see it.

11 AR: (Eng) It's okay no problem, go see it if  
12 you like.

13 S/AG G: (Eng) Look it, but tell him, I'll  
14 show him the money.

15 LE: Look, that I'm all screwed with that  
16 stuff here man, tell him that I can't stay here.

17 AR: (Eng) He's said he doesn't want to see  
18 it to into the car, look at it, if you think you can  
19 buy it...

20 S/AG G: (Eng) No can't we stay right here and  
21 look at it?

22 AR: (Eng) Yes.

23 S/AG G: (Eng) We are not going to drive  
24 somewhere.

25 LE: (Eng) No, No more, come in here.



1  
2 S/AG G: (Eng) Paul, Ah, wait right here, you  
3 stand right out here and watch.

4 SL: He thinks we are going to shoot him  
5 or something.

6 (CONVERSATION UNINTELLIGIBLE)

7 AR: Let's see, let me see

8 SL: Go in, go in, go in.

9 AR: (Eng) Let me get in, let me get in.

10 SL: Nobody is going to do nothing to you.  
11 Nothing - my love.

12 S/AG G: (Eng) Oh, this is more than a sample.  
13 This is an enghth. (Spanish) one?

14 SL: One, no, no it didn't reach for two  
15 brother, no didn't reach for two.

16 AR: (Eng) Not two

17 S/AG G: (Eng) Only one, Smells good, Yeah

18 SL: Yeah, ne things that we are going  
19 to take out a gun, we don't talk bullshit, we are not  
20 playing brother - you can't play with that brother.

21 (LE:) If he likes that one... tell him that  
22 I can get him, the other one later.

23 SL: For tomorrow, for tomorrow.

24 AR: (Eng) He says, if you like this one, he  
25 can get you this for later, The other one later or

both tomorrow. What do you think?

LE: (Eng) It's 10:20 P.M., (Spanish) tell him that no later than 11:30 or 12:00 I can have him the other one.

AR: (Eng) He said 11:30 or 12:00 he has both.

S/AG G: (Eng) I feel the rocks and I smell, smell that, here.

S/AG G (Eng) Alright - tell him how does he want his money, here take it, it smells good.

AR: (Eng) Well what do you say?

SL: Does he like it or doesn't he?

S/AG G: (Eng) Alright, How much? Good weight.

AR: OK - (Spanish) How much is it?

LE: I don't know, arrange with him for that.

SL: You already know, you have...

AR: Well OK how much per... Four thousand?

S/AG G: (Eng) Four thousand, right?

LE: Yea, yea.

AR: (ENG) But, now, we are going to wait for the other or what?

(ALL SPEAKING TOGETHER)

LE: Why Four Thousand?

SL: No, no no - look, you know it has a



1  
2 little cut, do you understand?

3 AR: Yes.

4 SL: Well no, no we are not going to ask for  
5 the four thousand, brother.. Ok, ok, so now we'll  
6 leave it at thirty-six.

7 AR: (Eng) \$3,600 Thousand not four, because  
8 it's a little cut.

9 S/AG G: (Eng) How much can it take?

10 AR: You know they are fair

11 LE (Eng) Maybe half, maybe half.

12 S/AG G: (Eng) One

13 LE (Eng) In the cut.

14 AR: Yea,

15 LE Yea

16 (ALL SPEAK AT ONCE)

17 AR: Okay one on it,

18 S/AG G: (Eng) How much do they say we can  
19 put on it?

20 AR: (Eng) How many can be put, 2 cuts?

21 SL: Two cuts, what you want...

22 S/AG G: (Eng) Two and a half

23 SL: (Eng) Yes

24 AR: (Eng) What do you think of that, do we  
25 wait for another?

1  
2 S/AG G: (Eng) Could he get me one more like  
3 that?

4 LE: (Eng) Maybe 12:00 in the night or  
5 tomorrow.

6 S/AG G: (Eng) How about if we just get it  
7 tonight, this tonight and tomorrow we get the one  
8 more.

9 LE: (Eng) Okay

10 S/AG G: (Eng) These are interesting prices,  
11 How you want to do? Do you want him to go to get  
12 the money?

13 LE: OK

14 S/AG G: (Eng) Okay and you wait until he comes  
15 back and my friend Carlos comes with him.

16 SL: OK ok

17 AR: Alright - ok

18 SL: You go with them to get the money.

19 No?

20 AR: (Eng) I go with you to bring the money.

21 S/AG G: (Eng) Yeah Yeah

22 AR: (Eng) Ok You wait there?

23 Pause - noise 5 sec.

24 AR: You don't want to wait?

25 LE: (Eng) I park in the other side, ok



1  
2 S/AG G: (Eng) No its better if we don't  
3 drive around.

4 AR: Wait here, until he comes with the money,  
5 ok? He has to count out the money and all...

6 S/AG G: (Eng) Does he have the merchandise  
7 or does the guy in the car?

8 AR: (Eng) Yes, he's got it in his coat.

9 NOISE

10 S/AG G: (Eng) The guy?

11 SL: Tomorrow the next one.

12 NOISE

13 AR: It's because we don't have any phone  
14 where to call you.

15 S/AG G: (Eng) Well, they can get one more  
16 right?

17 AR: Yes.

18 S/AG G: (Eng) Tell him that I have the  
19 money in the trunk, just tell him, I have my money -  
20 I put the money in trunk - ok - and also tell him  
21 to Montana the guy in the car - in the Ford - ok?

22 AR: (Eng) What?

23 S/AG G: (Eng) Yeah - To Montana the guy  
24 in the Ford - do you understand?

25 AR: (Eng) No, No.

S/AG G: (Eng) Okay, well

AR: (Eng) Get in the car

S/AG G: (Eng) Tell him to get inside and  
we'll count it on the inside.

AR: Out He says he has to count it out.

NOISE

S/AG G: (Eng) Shut the door, Montana the guy in  
the car

AR: Around the corner, Yeah ok he has it  
with him, he has it with him.

NOISE, 10 sec.

AR: (Eng) Around the corner around the  
corner he is OK around the corner. go ahead.

NOISE

AR: (Eng) Around the corner.

THE COURT: We'll take a five-minute recess  
now. Put the ear phones on your chairs.

MR. KIMMELMAN: Please shut them off.

THE COURT: Please pass the transcripts back.

(Transcripts collected from the jury by  
the law clerk.)

THE COURT: Very well. Take a recess.

(The jury leaves the courtroom.)

(Continued on the next page.)



